UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
ROBERT A. CARTER and	)	CASE NO. 99-31182 HCD
REBECCA S. CARTER,	)	CHAPTER 7
	)	
DEBTORS.	)	
	)	
	)	
VICKIE WOMACK,	)	
PLAINTIFF,	)	
vs.	)	PROC. NO. 02-3104
	)	
ROBERT A. CARTER,	)	
DEFENDANT.	)	

Appearances:

David W. Stewart, Esq., attorney for plaintiff, 931 Rangeline Road, Carmel, Indiana 46032;

Edward W. Hearn, Esq., attorney for defendant, Spangler, Jennings & Dougherty, P.C., 8396 Mississippi Street, Merrillville, Indiana 46410; and

Gary D. Boyn, Trustee, Warrick & Boyn, LLP, 121 West Franklin Street, Suite 400, Elkhart, Indiana 46516.

MEMORANDUM OF DECISION

At South Bend, Indiana, on March 22, 2004.

On February 27, 2004, this court granted the defendant's Motion for Summary Judgment and dismissed the plaintiff's Complaint for Determination Excepting Debt from Discharge. On March 11, 2004, the parties filed a "Joint Motion to Vacate Court's Order of February 27, 2004 Granting Defendant's Motion for Summary Judgment." In it, they stated that they had reached an agreement, a "Stipulation Regarding Liability and Covenant Limiting Execution Upon Any Judgment," that would govern the parties in the action pending against the defendant in the Wabash Superior Court. They requested that the court vacate its order granting summary judgment to the defendant. For the reasons that follow, the court denies the parties' motion.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(I) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Discussion

It is within a bankruptcy court's discretion to grant relief from the entry of a judgment. *See In re McDonald*, 118 F.3d 568, 569 (7th Cir. 1997). However, the burden is on the parties requesting that a judgment be vacated to establish the proper grounds for relief and to show exceptional circumstances. *See Clark v. Hiller (In re Hiller)*, 179 B.R. 253, 257 (Bankr. D. Col. 1994). The parties in this case filed their motion to vacate the court's Judgment and Memorandum of Decision of February 27, 2004 ("Order") without any legal buttressing of the motion.

Customarily, a motion seeking to vacate or to set aside a court order is brought as either a motion to alter or amend the judgment pursuant to Federal Rule of Bankruptcy Procedure 9023 and Federal Rule of Civil Procedure 59(e) or as a motion for relief from the judgment pursuant to Federal Rule of Bankruptcy Procedure 9024 and Federal Rule of Civil Procedure 60(b). The parties' motion cannot succeed as a Rule 59(e) motion, however, for it was not filed within ten days of the bankruptcy court's Order. *See* Fed. R. Bankr. P. 9006(a), 9023; *In re Bulic*, 997 F.2d 299, 301 (7th Cir. 1993) (describing 1989 amendment to Rule 9006). Nor have the

parties attempted to enlarge the ten-day filing period by explaining their failure to act timely in terms of "excusable neglect." *See* Fed. R. Bankr. P. 9006(b); *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 113 S. Ct. 1489, 123 L.Ed.2d 74 (1993) (defining "excusable neglect" under Rule 9006). The parties filed their motion to vacate outside the normal ten-day appeal period, as well.[1] *See* Fed. R. Bankr. P. 8002(a).

The remedy of setting aside or annulling a ruling usually is granted under Rule 60(b), which allows a court to vacate its order "within a reasonable time" when the parties demonstrate reasons for relief from the judgment. *See Sparrow v. Heller*, 116 F.3d 204, 206 (7th Cir. 1997) (affirming that a motion to vacate filed two months after entry of judgment was not filed within a reasonable time); *Hope v. United States*, 43 F.3d 1140, 1143 (7th Cir. 1994) (stating principle that "a motion to alter or amend a judgment under Rule 59(e) that is filed more than ten days after entry of judgment automatically becomes a Rule 60(b) motion"), *cert. denied*, 515 U.S. 1132 (1995). However, the parties failed to specify any Rule 60(b) ground upon which the Order could be vacated. The court finds, as well, that the parties proffered no argument that might conform to the grounds specified in Rule 60(b). They do not assert, for example, that they should be relieved from the Order by reason of "mistake, inadvertence, surprise, or excusable neglect," or "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(1), (6). "Relief under Rule 60(b) is an extraordinary remedy that is to be granted only in exceptional circumstances." *Provident Sav. Bank v. Popovich*, 71 F.3d 696, 698 (7th Cir. 1995) (citing cases). However, the parties have not even attempted to demonstrate that they are justified in invoking the extreme remedy of vacating the court's Order under Rule 60(b). *See In re Admetric Biochem, Inc.*, 300 B.R. 141, 148 (Bankr. D. Mass 2003) (finding "that the parties have failed to advance good

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[1] In addition, the court notes, the time for filing an appeal is not tolled by a motion to vacate under Rule 60(b). *See Bell v. Eastman Kodak Co.*, 214 F.3d 798, 700-01 (7th Cir. 2000). Moreover, a motion to vacate under Rule 60(b) is not a substitute for a motion to reconsider or for an appeal. *See Neuberg v. Michael Reese Hosp. Found.*, 123 F.3d 951, 955 (7th Cir. 1997).

and sufficient reasons for relief" from the court's order). Instead, they assert that they have reached their own decision by a stipulated agreement and, in particular, that they have agreed to dismiss this matter with prejudice. By asking the court to set aside its Order, they implicitly suggest that the court's decision is moot now that they have reached a settlement between themselves.

The Supreme Court made clear in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 115 S. Ct. 386, 130 L.Ed.2d 233 (1994), that the vacating of a lower court judgment upon the request of the parties as part of a settlement agreement is not justifiable unless there are exceptional circumstances.[2] *See Bonner Mall*, 513 U.S. at 29, 115 S. Ct. at 393 (stating that "the determination [of vacating a judgment] is an equitable one, and exceptional circumstances may conceivably counsel in favor of such a course"); *see also, e.g., In re Admetric Biochem*, 300 B.R. at 146; *Clark v. Hiller (In re Hiller)*, 179 B.R. 253, 258 (Bankr. D. Col. 1994). As the Seventh Circuit Court of Appeals commented, "the parties' mutual assent cannot wipe a judicial decision from the books." *Berthold Types Ltd. v. Adobe Systems, Inc.*, 242 F.3d 772, 776 (7th Cir. 2001). According to the Supreme Court in *Bonner Mall*, vacatur is an extraordinary remedy affecting public interest concerns. *See Bonner Mall*, 513 U.S. at 26-27; 115 S. Ct. at 392. Courts faced with motions to vacate their own decisions, rather than a lower court's decision, have followed *Bonner Mall*. They have held that "requests for *vacatur* based on post-judgment settlement should not be routinely granted," *In re Hiller*, 179 B.R. at 255, and "should proceed from a careful consideration of the public interest, either by the appellate court in the exercise of its own equitable power, or by the district court within the context of the Rule 60(b) motion." *Aetna Cas.& Sur. Co. v. Home Ins. Co.*, 882 F. Supp. 1355, 1357 (S.D.N.Y. 1995).

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[2] In *Bonner Mall*, the Supreme Court reviewed 28 U.S.C. § 2106, the statute that supplies the power of vacatur, which authorizes appellate courts to vacate (or affirm, modify, set aside or reverse) a judgment brought before them for review. *See* 513 U.S. at 21, 115 S. Ct. at 389. Since that decision, however, courts have applied *Bonner Mall* to determine whether a court should vacate its own earlier judgment when the parties reach a settlement after the judgment and seek vacatur. *See, e.g., Aetna Cas. & Sur. Co. v. Home Ins. Co.*, 882 F. Supp. 1355, 1355-57 (S.D.N.Y. 1995); *In re Admetric Biochem*, 300 B.R. at 145-48.

This court has weighed the settlement interests of the parties against the public interest in finality of judgments and has determined that "the balance disfavors vacatur." *Id.* at 1358. It notes, first, that the plaintiff initiated and controlled this adversary proceeding by filing a complaint. However, she did not respond to the defendant's summary judgment motion and was required to show cause why the case should not be dismissed for failure to prosecute. She responded to the show cause order on October 8, 2003, by notifying the court that the parties had reached an agreement and that she was awaiting the defendant's signature on the stipulation. Because no agreement had been filed by the conclusion of the briefing period, however, the court took the summary judgment motion under advisement. On February 27, 2004, when the court issued its Order granting summary judgment to the defendant, the stipulation still had not been filed with the court.

The plaintiff's Response to the court's second Order to Show Cause was filed on February 26, 2004, the day before the court issued its Order. However, it was of no benefit to the plaintiff. It was an incomplete and unsigned document.[3] *See* Fed. R. Bankr. P. 9011. Moreover, the stipulation was not attached as part of the Response. In substance, the Response was a litany of excuses: It recounted errors in the caption and the signature lines, failures to enclose an attachment to the stipulation, and the plaintiff's frequent inability to contact the defendant's attorney or to obtain the defendant's signature on the corrected Stipulation and Assignment of Rights. The nonconforming, unsigned Response was not properly before the court, and the Stipulation was not even filed with the court.

The court has considered the countervailing interests involved and finds that its Order of February 27, 2004, should not be vacated. The parties have not argued that the summary judgment ruling rested on a legal error or an erroneous assessment of the evidence. Rather, this court, like the United States Bankruptcy Court in the District of Massachusetts, has been asked "to vacate its own decision in the absence of an appeal or even the unconditional forfeiture of the appeal process." *In re Admetric Biochem*, 300 B.R. at

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[3] The document contained three pages of statements, which ended with paragraph number 16, with no conclusion, no signature page, and a missing exhibit.

147. Like the Massachusetts court, it has found that there were no exceptional circumstances in the case before it and that the losing litigant "'rolled the dice' with respect to the cross-motions for summary judgment and is now attempting to wash away the unfavorable outcome." *Id.* (*quoting Bonner Mall*, 513 U.S. at 28, 115 S. Ct. at 393). In fact, it finds that vacating the court's Order would result in prejudice to the defendant debtor, to whom summary judgment was granted.

This court determines that, in this case, the litigants themselves, by agreeing to settle after the Order, have attempted to make moot the court's decision. However, considerable judicial resources have been expended in this case. Moreover, "[j]udicial practice and public policy do not favor routine *vacatur* and this may be particularly true for dischargeability litigation." *In re Hiller*, 179 B.R. at 261-62. The court finds that its Order in favor of the defendant debtor upholds the public interest in this bankruptcy setting. The Colorado bankruptcy court succinctly stated the public policy consideration:

> To set precedent that unfavorable dischargeability decisions can be routinely vacated and swept away by post-judgment settlements is a dangerous course, as well as a grave disservice to the bankruptcy system. The reasoning, rationale, and conclusions in *Bonner Mall* are every bit as applicable to bankruptcy cases as to others; and, perhaps, in dischargeability litigation, even more so.

Id. at 261. Because the court's grant of summary judgment to the defendant debtor gives the debtor a fresh start and promotes the policy of finality of judicial decision-making, and because the parties have proffered no justification for vacating it, the court determines that it will not grant the motion to vacate the court's Order.

Conclusion

For the reasons set forth in this Memorandum of Decision, the court denies the parties' "Joint Motion to Vacate Court's Order of February 27, 2004 Granting Defendant's Motion for Summary Judgment" filed by the plaintiff Vickie Womack and the defendant Robert A. Carter.

SO ORDERED.

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HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT